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May 25, 1993

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MAY 25 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Ms. Searcy:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and six (6) copies of its "Second Motion to Enlarge Issues Against Wilburn."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: John W. Hunter
John W. Hunter S.T. 9

By: Stephen F. Yelverton
Stephen F. Yelverton

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

MM Docket No. 93-107

File Nos. BPH-911230MA

through

BPH-911231MB

To: Administrative Law Judge
Walter C. Miller

SECOND MOTION TO ENLARGE ISSUES AGAINST WILBURN

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: _____
John W. Hunter

By: _____
Stephen T. Yelverton
Attorneys for Ohio Radio
Associates, Inc.
1155 15th Street, N.W., Suite 400
Washington, D.C. 20005
Telephone: (202) 659-3900

May 25, 1993

B:SEARCY52.FCC

SECOND MOTION TO ENLARGE ISSUES AGAINST WILBURN

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.229 (b)(1) of the Commission's Rules, hereby submits this motion to enlarge the issues against Wilburn Industries, Inc. ("Wilburn"). This motion is based on documents exchanged by Wilburn on May 10, 1993, pursuant to the standard document production, and thus is timely filed within fifteen (15) days of the discovery of new information. In support of its motion to enlarge the issues, ORA submits the following comments.

Wilburn exchanged a copy of a letter, dated December 24, 1991, from Mid-Ohio Communications, Inc. The letter states in pertinent part that Mid-Ohio is "willing to negotiate" and has an "intent to negotiate" with Wilburn as to use of its transmitter tower and facilities. Moreover, "mutually acceptable terms" would be negotiated in the future. Within sixty (60) days of the date of the letter, Wilburn was required to make a satisfactory showing to Mid-Ohio of its financial qualifications to enter into lease arrangements for the tower and facilities.

Under long-established Commission policy, Wilburn does not have "reasonable assurance" of Mid-Ohio's tower site. National Communications Industries, 6 FCC Rcd 1978, 1979, para. 10 (Rev. Bd. 1991), aff'd, 7 FCC Rcd 1703, para. 2 (1992), "reasonable assurance" of the availability of a tower site requires more than a "willingness to deal" on the part of the tower site owner; Rem Malloy Broadcasting, 6 FCC Rcd 5843, 5846, para. 14 (Rev. Bd. 1991), the fact that the site owner could foresee no problem in giving a lease does not constitute "reasonable assurance" where lease terms remain to be negotiated, citing William F. and Anne K. Wallace, 49 FCC2d 1424, 1427 (Rev. Bd. 1974); Adlai E. Stevenson, 5 FCC Rcd 1588, 1589, para. 6 (Rev. Bd. 1990), the fact that the site owner has indicated that he will discuss the possibility of a lease at some future date is insufficient, citing El Camino Broadcasting Corp., 12 FCC2d 25, 26 (Rev. Bd. 1968).

A "willingness to negotiate" does not constitute "reasonable assurance." Emission de Radio Balmeseda, Inc., 7 FCC Rcd 8629, n. 4 (Rev. Bd. 1992). Although rent and other details may be negotiated in the future, the basic terms of a

tower lease must be negotiated in order to possess "reasonable assurance." Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 4332, para. 11 (1991), citing National Innovative Programming Network of the East Coast, 2 FCC Rcd 5641, 5643, para. 11 (1987).

An applicant is required to negotiate with the site owner in order to possess "reasonable assurance." Dutchess Communications Corp., 101 FCC2d 243, 253, para. 14 (Rev. Bd. 1985). Some basic negotiations between the applicant and the site owner must occur in order to constitute "reasonable assurance." Cuban-American Limited, 2 FCC Rcd 3264, 3266, para. 13 (Rev. Bd. 1987), rev. denied, 5 FCC Rcd 3781, para. 2 (1990). Even if a site owner would "favorably consider" use of his property and would at a future date commence "negotiations for finalizing arrangements," this is insufficient. Lee Optical and Associated Cos. Retirement and Pension Fund Trust, 2 FCC Rcd 5480, 5486, para. 23 (Rev. Bd. 1987).

Accordingly, based on applicable Commission precedent, the Mid-Ohio letter does not constitute "reasonable assurance" of a tower site. Therefore, a tower site availability issue must be specified.

Another independent basis to specify a tower site availability issue is the failure of Wilburn to comply with the express terms of the Mid-Ohio letter. It required Wilburn to demonstrate to Mid-Ohio within sixty (60) days of the date of the letter its financial qualifications to enter into a tower and facilities lease. Although Wilburn was required, pursuant to Section 1.325 (c)(1)(F), to produce on May 10, 1993, all documents relating to its proposed tower site, it failed to produce any such documents required to be shown to Mid-Ohio in 1992. Thus, it must be presumed that Wilburn failed to comply with Mid-Ohio's requirements and conditions precedent to enter into a lease arrangement. The failure of an applicant to meet the express conditions required by a tower site owner raises a substantial and material question of fact as to whether the applicant has "reasonable assurance" of its proposed tower site. Cuban-American Limited, 3266, paras. 12-13.

Accordingly, the Presiding Judge is requested to specify the following issue:

To determine whether Wilburn Industries, Inc. has "reasonable assurance" of its proposed tower site, and if not, whether it is basically qualified to be a Commission licensee, and thus whether its application should be granted?

If this issue is specified, ORA requests that all documents, not already exchanged, relating to the proposed tower site of Wilburn and relating to its contacts with Mid-Ohio, be produced.

WHEREFORE, in view of the foregoing, ORA requests that the foregoing issue be specified against Wilburn.

Respectfully submitted,

McNAIR & SANFORD, P.A.

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John W. Hunter

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May 25, 1993

0202979.00001
ORA.81

MID-OHIO COMMUNICATIONS, INC.

**Post Office Box 14
Westerville, Ohio 43081**

December 24, 1991

**Charles W. Wilburn
Attorney at Law
210 S. Court Street
Circleville, OH 431131**

RE: Mid-Ohio Communications, Inc./WBBY-FM/Lease of Assets

Dear Mr. Wilburn:

This correspondence is in regard to your recent inquiry pertaining to the lease of certain real property and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies which is utilized in regard to the broadcast operation of WBBY-FM. You have indicated that you are planning to apply for the broadcast license of WBBY-FM, Westerville, Ohio, and this correspondence is to confirm that should the Federal Communications Commission award you the construction permit, Mid-Ohio Communications, Inc., the former licensee of WBBY-FM, is willing to negotiate appropriate leases with you for certain real property and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies in the amount of Six Thousand Dollars (\$6,000.00) per month.

The real estate lease and equipment lease which would commence upon the FCC granting your construction permit would include the use of the tower site (tower and building) located at State Route 37, Sunbury, Ohio 43074; studio facilities located at 14 Dorchester Court, Westerville, Ohio 43081; and equipment utilized in the operation of the station. The equipment would include some or perhaps all of the equipment itemized in the inventory accompanying this correspondence. Failure to lease all of the equipment listed in the inventory will not result in a reduced lease package price. This correspondence conveys an intent to negotiate terms of lease agreements and does not in and of itself constitute lease

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 25th day of May, 1993, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Second Motion to Enlarge Issues Against Wilburn" to the following:

The Honorable Walter C. Miller*
Administrative Law Judge
Federal Communications Commission
Room 213
2000 L Street, N.W.
Washington, D.C. 20554

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Hearing Branch
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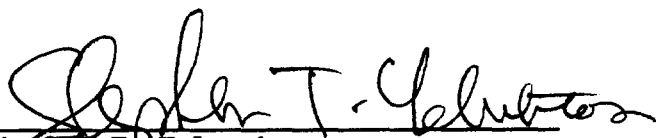
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Stephen T. Yelverton